No. 80-298

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE, PETITIONER

v.

THE STANDARD OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent's primary contention (Br. 11-23) is that 38 U.S.C. 2024(d) alone governs a reservist's statutory rights with respect to conflicts between his civilian employment obligations and his short-term military obligations. Section 2021(b)(3), of course, was enacted several years after Section 2024(d) with the intent of strengthening the existing protection for reservists. See *Carney* v. *Cummins Engine Co.*, 602 F. 2d 763, 765 (7th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). According to respondent, however, Section 2021(b)(3) protects the reservist only "against discharge, demotion, or other discrimination motivated by reservist status" (Br. 9; see also Br. 15) and thus adds nothing to the protection of Section 2024(d) in this case. This contention simply ignores the plain language of the statute, which prohibits not only the denial of "retention in employment" but also the denial of "any promotion or

other incident or advantage of employment" because of any reserve obligation.[1] Certainly, under Section 2021(b)(3), an employer violates this statute if it discharges a reservist because of his repeated absences due to military obligations, thereby denying him "retention in employment." By the same token, an employer also violates the statute if it denies a reservist any "other incident or advantage of employment" because of his military absences.[2] Here, both courts below agreed that a 40-hour work week was an incident or advantage of employment at respondent's refinery (Pet. App. 7a-8a, 24a); hence, the denial of that benefit to petitioner plainly violated Section 2021(b)(3).[3]

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[1]Respondent briefly adverts to the actual text of the statute, asserting (Br. 28) that the broad phrase "any other incident or advantage of employment" refers only to "employment opportunities, comparable to promotions or advancements (*e.g.*, training)." Respondent offers no support for this narrow definition nor any explanation why Congress sought to protect a reservist's training opportunities but not his opportunity to work 40 hours when his fellow employees without reserve obligations are permitted to do so.

[2]Contrary to respondent's suggestion (Br. 14-21), it is hardly remarkable that Congress elected in Section 2021(b)(3) to protect reservists against the denial of benefits other than retention in employment, even though returning veterans do not have precisely analogous protection. The problems in civilian employment encountered by reservists, such as petitioner's weekend conflicts, are a consequence of recurring, short-term military obligations; such problems would never be faced by a veteran returning from a single long-term period of military service.

[3]Respondent argues (Br. 37 n.13) that the collective bargaining agreement at the refinery did not guarantee a 40-hour work week. As we noted in our opening brief (Br. 22 n.12), however, the statutory protection for veterans and reservists is not restricted to rights established under a collective bargaining agreement, but extends as well to rights established by custom and practice at the workplace. Respondent's belated contention therefore offers no basis for disturbing the factual finding of the courts below that the 40-hour week was an incident or advantage of employment at respondent's refinery. Cf. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). Thus, as the court of appeals itself admitted (Pet. App. 12a-13a), the decision below is squarely in conflict with *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir. 1980).

Respondent seeks to avoid this conclusion by mischaracterizing petitioner's position as requiring "affirmative action" or "preferential treatment" that is not mandated by the statute (Br. 24-32). The thrust of Section 2021(b)(3) is simply that a reservist may not be denied benefits protected by the statute because of his military absences, even though similar non-military absences from work would be grounds for denial of the benefits. In short, an employer is not permitted to cure the inconvenience caused by a reservist's absences by denying the reservist an "incident or advantage of employment." As respondent recognizes (Br. 33), the result is that the employer "must find alternate means for getting the job done." The necessity for the employer to find such an alternative exists where the statute requires a reservist to be promoted to or retained in a position that ordinarily requires attendance at work on days that conflict with his military obligations. Similarly, where the statute requires that a reservist not be denied a 40-hour work week, an accommodation to a rotating shift schedule may be needed. As we explained in our opening brief (Br. 17-18), the fact that the employer may have to make some adjustment in its ordinary routine in order to comply with the statute does not mean that Section 2021(b)(3) imposes an "affirmative action" or "preferential treatment" requirement.[4] Petitioner asks only that he receive the same benefits as his fellow employees who do not have military obligations; he does not gain any advantage over his fellow employees by becoming a member of the military.

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[4]Indeed, the record reflects that respondent has made adjustments because of petitioner's reserve absences. When petitioner has attended reserve training sessions, his place has been taken by workers from the "extra board" or other employees in petitioner's classification who must be paid overtime (Br. 5). What respondent resists is making adjustments that would protect petitioner against the denial of an employment benefit.

2. Contrary to respondent's repeated suggestions (Br. 21, 27, 34-35), petitioner has never urged that Section 2021(b)(3) requires a reservist to be paid for hours that he does not work. Nor has petitioner urged that the statute imposes an absolute requirement upon employers to provide reservists with employment benefits such as a 40-hour work week. As we noted in our opening brief (Br. 23-24), there may be situations, depending on the particular employment setting, where it is not possible to give a reservist who has weekend training obligations the benefit of a 40-hour work week. In those situations, the failure to provide a reservist an opportunity to work 40 hours does not violate the statute.[5] For example, if a business's operating hours are such that the reservist cannot meet his military obligations and still work 40 hours, the statute does not require the reservist to be paid for 40 hours. The statute, however, does require the employer to pursue reasonable measures to accommodate a reservist's absences so that he will not be denied a benefit given to his coworkers. Where, as here, the employer fails to make reasonable efforts to accommodate the reservist's military obligations, the reservist is entitled to compensation as a remedy for the employer's violation of the statute.

Respondent now suggests (Br. 39-40) that it cannot possibly accommodate petitioner's training schedule. There is nothing in the record to support this assertion. The stipulated facts upon which this case was submitted to the district court state unequivocally that respondent made no effort to

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[5]As we noted in out opening brief (Br. 23-24), it is clear that a reservist is not entitled to compensation for work weeks lost because of attendance at a two-week training session. An employee obviously cannot both attend the two-week training session and be present for work. There is no similar incompatibility between occasional weekend absences and a 40-hour work week. Thus, there is no basis for respondent's suggestion (Br. 27) that, if petitioner prevails here, reservists will be entitled to compensation for working time lost because of lengthy training sessions.

accommodate petitioner's schedule (J.A. 26). Any evidence that it would have been unduly burdensome for respondent to adjust petitioner's schedule should have been presented to the district court; instead, respondent has consistently maintained that it is under no obligation to accommodate petitioner. In any event, it seems apparent that most, if not all, of petitioner's schedule conflicts could be easily resolved by exchanging his scheduled weekend shifts with those of other employees. Contrary to respondent's contention (Br. 39), such exchanges would not necessarily result in additional weekend shifts for petitioner's coworkers; petitioner could work a weekend shift for a coworker on one weekend in return for that coworker's exchanging shifts with petitioner to solve a reserve conflict on another weekend.[6] Certainly, there is no inherent reason why a reservist cannot be scheduled for a 40-hour week despite weekend training obligations. In *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147, 148 (5th Cir. 1980), for example, the employer conceded that it would have been no trouble to accommodate the reservist's schedule.

3. Respondent erroneously contends (Br. 21-23) that the Department of Labor has consistently given Section 202(b)(3) the narrow interpretation urged by respondent in this

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[6]At an earlier stage of this case, petitioner devised an exchange scheme along these lines for petitioner's regular monthly training obligations in 1977 as an illustration. As respondent notes (Br. 39), the suggested scheme is flawed in that it results in a few instances of consecutive shifts. These errors in the illustration, however, hardly suggest that petitioner's military obligations could not be accommodated. First, there is no reason to believe that the illustration could not be improved. Moreover, even assuming that the illustration could not be perfected, it nonetheless clearly demonstrates that most of petitioner's absences could be easily accommodated. Respondent's other objection that the suggested scheme does not account for the absences of record in this case is quite puzzling in light of the fact that the illustration referred only to expected absences in 1977, not the 1975-1976 absences that are the subject of this litigation.

case. Quite apart from the fact that the Department has always maintained the position taken here in litigation on behalf of reservists, the very source relied upon by respondent belies its contention. In discussing the *Veterans' Reemployment Rights Handbook*, respondent urges that an example in the *Handbook* involving "Maintenance Man M" is of particular interest (Br. 22; see Br. A3). In that example, a reservist is first in line for a promotion to a job that requires Saturday work, which conflicts with the reservist's training obligations. The *Handbook* explains that the statute prohibits the employer from conditioning the promotion upon the reservist's availability for work on Saturday. Rather, the reservist is entitled to the promotion, even though the employer will be required to take additional steps to solve its Saturday staffing problem.

Petitioner's position in this case mirrors this example. The "incident or advantage of employment" protected by the statute here is a 40-hour work week, not a promotion. As in the example in the *Handbook*, the employer cannot deny this benefit to petitioner because of his unavailability for work on a given weekend. Rather, petitioner is entitled to be scheduled for a 40-hour week, even though this may require the employer to take some additional steps to adjust the work schedule.

4. Respondent asserts (Br. 37-40) that this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), concerning accommodation of religious needs under Title VII of the Civil Rights Act of 1964, establishes that its rigid scheduling practices did not violate petitioner's statutory rights. But *Hardison* has no application to this case for several reasons. The purposes of Title VII are quite different from those of the veterans' reemployment rights provisions. Title VII is aimed at eliminating employment discrimination

against any employee or group of employees; thus, the Court held that Title VII does not contemplate depriving some employees of their contractual rights in order to accommodate the religious needs of other employees. 432 U.S. at 81. Section 2021(b)(3), on the other hand, is aimed at the protection of a particular class of employees, those with military reserve obligations. As explained in our opening brief (Br. 9-15), Congress has declared that reservists should not be unduly penalized for absences caused by military obligations. Specifically involved in this case is the important congressional purpose of strengthening our nation's reserve forces that is served by minimizing the economic disincentives to reserve duty. See *Peel* v. *Florida Dep't of Transportation*, 443 F. Supp. 451, 459 (N.D. Fla. 1977), aff'd, 600 F. 2d 1070 (5th Cir. 1979). Finally, petitioner here is not seeking the disruption of contractual seniority rights that this Court refused to require in *Hardison*; shift assignments at respondent's refinery are not based on seniority. See Resp. Br. 4-5.[7] Accordingly, *Hardison* casts no light on the proper interpretation of Section 2021(b)(3).[8]

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[7]Nor are any other contractual rights of petitioner's coworkers jeopardized, as respondent claims (Br. 35-37). The collective bargaining agreement provision permitting voluntary shift exchanges need not be altered. However, if petitioner is unable to arrange voluntary exchanges with his coworkers, the employer must make reasonable efforts to accommodate his schedule.

[8]Indeed, respondent implicitly recognizes that the standards applicable under Title VII do not apply here because it concedes that petitioner could not have been discharged for failure to work his scheduled shift, as Hardison was.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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